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No. 94-461

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANK E. VENNES, JR., PETITIONER

v.

AN UNKNOWN NUMBER OF UNIDENTIFIED AGENTS OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether petitioner stated a cause of action under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for alleged violations of his substantive due process rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 26 F.3d 1448. The order of the district court (Pet. App. 24-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1994. A petition for rehearing was denied on August 10, 1994. Pet. App. 29. The petition for a writ of certiorari was filed on September 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May, 1987, petitioner was charged in three indictments returned in the District of North Dakota with violations of the federal money-laundering, firearm, and drug laws. In August, 1987, petitioner entered into a plea agreement regarding those charges. Petitioner agreed to plead guilty to one count of money laundering and to plead no contest to one count of illegally selling a firearm and one count of using a telephone to facilitate the distribution of cocaine. The government agreed to dismiss the other charges. See Pet. App. 3; C.A. App. 19-20, 57-58, 134-136.

In a hearing on petitioner's pleas, the district court questioned counsel about the no-contest pleas that petitioner had agreed to make to two of the charges. Counsel for petitioner explained that petitioner was "prepared to defend himself on the basis of entrapment [and] outrageous government conduct" but wished to plead no contest because those defenses were "extremely difficult" to prove. Pet. App. 3; C.A. App. 65. The prosecutor explained that the government was not insisting on guilty pleas to the two charges, because petitioner "could make a fair case" that he had committed the underlying offenses in order to recoup $100,000 for an undercover agent [illegible]o petitioner believed was associated with organized crime. Pet. App. 3; C.A. App. 67. The district court accepted petitioner's pleas after finding that they were knowing and voluntary, that petitioner was guilty of money laundering, and that petitioner understood that his no-contest pleas would be treated as guilty pleas at sentencing. Petitioner was sentenced to five years' imprisonment. He did not appeal his conviction or sentence. Pet. App. 3-4; C.A. App. 59-101, 130-138.

2. Petitioner later filed two petitions for relief under 28 U.S.C. 2255. In the first petition, he claimed that his trial attorney provided constitutionally deficient representation because the attorney did not seek dismissal of the charges on the grounds of entrapment and outrageous government conduct. The district court denied that petition. See Pet. App. 4. In affirming the district court's ruling, the Eighth Circuit observed that, contrary to petitioner's claim that his lawyer had not adequately investigated the allegedly improper governmental conduct, "[t]he transcript of the [guilty plea] hearing makes it clear that defense counsel was well aware that his client had a factual basis for asserting outrageous government conduct and entrapment, and that these matters were considered and discussed at the * * * hearing." C.A. App. 335.

In his second petition under 28 U.S.C. 2255, petitioner claimed that the government breached its plea agreement with him by disclosing confidential information to parole officials. Pet. App. 4-5; C.A. App. 337. After "carefully review[ing] the record," the Eighth Circuit affirmed the district court's denial of the petition, holding that "the district court thoroughly and properly examined [petitioner's] claims." C.A. App. 338.

3. a. After completing his sentence, petitioner brought this action against an unspecified number of unnamed federal agents in the United States District Court for the District of North Dakota, seeking money damages under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner claimed that the unnamed agents conspired to violate his rights under the Fourth, Fifth, Sixth, and Eighth Amendments. In support of that claim, he alleged that he committed the money-laundering offense to which he later pleaded guilty when he transported

$100,000 in currency to Switzerland without filing the currency reports required by federal law. He alleged that he did this at the behest of undercover federal agents and that they supplied the currency. He also alleged that, after the $100,000 was stolen from him, undercover federal agents posing as mafia figures coerced him into attempting to recoup the $100,000 by committing the firearm and drug offenses to which he later pleaded no contest. Petitioner further alleged that, as part of the claimed conspiracy, agents of the Internal Revenue Service (IRS) made false demands on him, and imposed a levy on his property, for delinquent taxes. Pet. App. 1-2, 5-6; C.A. App. 3-7. The government moved to dismiss the complaint or in the alternative for summary judgment.[1]

The district court dismissed petitioner's claims to the extent that they were based on alleged misconduct by IRS agents. It held that the exclusive remedy for such misconduct was provided by the Internal Revenue Code. It granted summary judgment against petitioner with respect to the remaining claims. It held that he was estopped from asserting those claims because he had pleaded guilty or no contest to the offenses that allegedly

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[1] As the court of appeals noted, petitioner "failed to name or serve *any* agent, even though many of the undercover investigators were named in his indictment or identified elsewhere in the record of his criminal case." Pet. App. 5 n.2. Petitioner served the complaint only upon the U.S. Attorney and the Attorney General, even though the United States was not named as a defendant. See Fed. R. Civ. P. 4(i). The Assistant U.S. Attorney who moved for dismissal or summary judgment and appeared in the district court, purportedly on behalf of the unnamed defendants, was authorized by certain individuals to represent them in the event that they were named as defendants.

arose from the government misconduct on which his claims were based. Pet. App. 26-27.

b. On appeal, petitioner argued only that he had stated a cause of action under *Bivens* for violations of his substantive due process rights; he did not renew his claims of violations of other constitutional rights. In support of his substantive due process claim, he relied on "a line of cases in the U.S. Supreme Court such as *Rochin v. California*, 342 U.S. 165 [(1952)], *U.S. v. Russell*, 411 U.S. 423 [(1973)], and *Hampton v. United States*, 425 U.S. 484 [(1976)], that suggest the due process clause * * * can be violated *even in the absence of a procedural violation* by law enforcement authorities who go too far in manufacturing a crime and inducing a defendant into committing it." Pet. C.A. Br. 21. He also relied on *Gunderson* v. *Schlueter*, 904 F.2d 407, 410-411 (1990), in which the Eighth Circuit suggested that an action might lie against state law enforcement officials under 42 U.S.C. 1983 if their conduct was shown to be so outrageous as to deprive the plaintiff of substantive due process. Pet. C.A. Br. 21; see also Pet. C.A. Reply Br. 8.

The court of appeals affirmed, holding that petitioner had failed to state a *Bivens* claim for violations of substantive due process. Pet. App. 1-23. The court based that holding on petitioner's failure to raise defenses of entrapment or outrageous government conduct in the criminal proceeding against him. The court observed that "[t]he alleged deprivation of [petitioner's] rights occurred during the criminal investigation and resulted in his being charged with multiple crimes." *Id.* at 9. The court reasoned that "[b]y pleading guilty, [petitioner] elected to forego the post-deprivation process best suited

to determining whether the agents in fact violated his due process rights—the criminal trial." *Ibid.*[2]

Senior Circuit Judge Heaney dissented with respect to the allegations in petitioner's complaint that did not concern IRS agents. Pet. App. 13-23. With respect to those allegations, he discerned "no special factors" that justified withholding a *Bivens* remedy. *Id.* at 13 (internal quotation marks omitted).

ARGUMENT

Petitioner renews his contention that his complaint stated a cause of action under *Bivens* for violations of substantive due process arising from alleged outrageous conduct by law enforcement officials. Pet. 8-11. The availability of a *Bivens* remedy for such conduct is not the subject of a circuit conflict or any other reported court of appeals decision of which we are aware. Moreover, the court of appeals correctly held that petitioner did not have a *Bivens* remedy in light of his failure to raise (much less prove) a defense of outrageous government conduct in the criminal proceeding against him.[3]

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[2] In the alternative, the court of appeals reasoned that the proximate cause of the injuries for which petitioner sought to recover—all of which stemmed from his imprisonment—was his decision to plead guilty and no contest to certain charges pursuant to a plea agreement, and not the alleged government misconduct that gave rise to the charges against him. Pet. App. 10. The court concluded that "[t]o the extent that the alleged outrageous government conduct was not the proximate cause of [petitioner's] injuries, his damage claim must fail as a matter of law." *Ibid.* The court also concluded that a *Bivens* remedy for the alleged misconduct by IRS agents was precluded by the availability of statutory remedies for such misconduct. *Id.* at 11-12.

[3] As an initial matter, it is doubtful that the district court had authority to adjudicate petitioner's claims. To the extent that

1. Petitioner contends that *Bivens* provides a civil remedy against law enforcement officials "who go to[o] far in manufacturing a crime and in inducing an

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petitioner was suing respondents in their individual capacities, it is not clear that the district court had personal jurisdiction over any defendant. The complaint did not identify any federal agent by name, even though, as the court of appeals noted, several agents involved in the criminal investigation of petitioner had been named in the indictment and other parts of the record of the criminal proceeding against him. See Pet. App. 5 n.2. Nor did petitioner serve the complaint upon any individual federal agent. Instead, he served only the U.S. Attorney and the Attorney General; service on them, however, would have been effective in conferring personal jurisdiction only over the United States, which was not named as a defendant. See Fed. R. Civ. P. 4(i); see also, *e.g.*, *Friedman* v. *Estate of Presser*, 929 F.2d 1151, 1155-1156 (6th Cir. 1991). It is not clear whether the defect in service was waived by the appearance of an Assistant U.S. Attorney (AUSA) in the district court. The AUSA was acting on behalf of certain individuals who asked him to represent them in the event that they were made named defendants. Only those individuals could be deemed to have waived personal service under Fed. R. Civ. P. 12(h)(1). It is purely speculative on this record whether those individuals were the same individuals encompassed by the class of unnamed defendants to which the complaint referred. The government contended in the court of appeals that, in light of petitioner's failure to name any specific officers as defendants and the vague and conclusory nature of his allegations, his action was, in reality, an action against the United States that was barred by sovereign immunity. See Gov't C.A. Br. 14-17. The court of appeals stated that petitioner's "conclusory, overbroad complaint lends considerable credence to this contention." Pet. App. 5 n.2. The court of appeals declined to rule on the contention, however, because "it was not raised in the district court." *Ibid.* However, "[s]overeign immunity is jurisdictional in nature," *FDIC* v. *Meyer*, 114 S. Ct. 996, 1000 (1994), and may be raised as a defense at any stage of the proceeding, see *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940); see also *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

otherwise law-abiding citizen into committing that crime." Pet. 8-9. Petitioner does not cite (and we are not aware of) any decision of this Court or another court of appeals that addresses the question.

In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), this Court stated: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." See also *Hampton* v. *United States*, 425 U.S. 484, 492-493 (1975) (Powell, J., concurring); cf. *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986). Several courts of appeals likewise have recognized the possible existence of a criminal defense of "outrageous government conduct." See, *e.g.*, *United States* v. *Mosley*, 965 F.2d 906, 908-909 (10th Cir. 1992); *United States* v. *Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991); *United States* v. *Robinson*, 763 F.2d 778, 785 (6th Cir. 1985); *United States* v. *Reifsteck*, 535 F.2d 1030, 1034-1035 (8th Cir. 1976); but see *United States* v. *Miller*, 891 F.2d 1265, 1271-1273 (7th Cir. 1989) (Easterbrook, J., concurring). Only two courts of appeals, however, have reversed a conviction because of "outrageous government conduct." See *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978); *Greene* v. *United States*, 454 F.2d 783 (9th Cir. 1971); cf. *United States* v. *Cuervelo*, 949 F.2d 559 (2d Cir. 1991) (remanding for further proceedings on defense of outrageous government conduct). And no court of appeals has held that such conduct supports recovery for money damages in a civil action under *Bivens* or Section 1983.

Petitioner implicitly acknowledges the absence of legal support for his *Bivens* claim when he states that "th[is] action was commenced in reliance o[n] the 8th Circuit Court of Appeals' decision in *Gunderson*." Pet.

8. *Gunderson* suggested, without holding, that relief under Section 1983 might lie for outrageous government conduct. 904 F.2d at 410-411. In the present case, the Eighth Circuit correctly characterized the *Bivens* issue before it as "unique" and resolved that issue primarily by reference to its prior decision in *Gunderson*. Pet. App. 6; see also *id.* at 8, 11. The Eighth Circuit's holding that petitioner did not meet the standard for a civil remedy suggested in *Gunderson* does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. In any event, and assuming arguendo that *Gunderson* provides the proper standard for *Bivens* relief here (as petitioner argues, see Pet. 9), the court of appeals correctly held that *Gunderson* does not aid petitioner.

In *Gunderson*, the plaintiff sought damages under 42 U.S.C. 1983 from a state law enforcement officer who allegedly entrapped him into conduct that gave rise to state criminal charges. 904 F.2d at 408-409. The plaintiff had been acquitted of the charges after raising, and apparently establishing, an entrapment defense at the criminal trial. *Id.* at 408, 411. The Eighth Circuit affirmed the dismissal of his Section 1983 claim. It held that he had not met the "quite high" standard of proof necessary to establish outrageous government conduct. 904 F.2d at 410. In addition, it reasoned that the plaintiff's acquittal should be "the full extent of his remedy," because "[f]inding a due process violation here would bring us too close to converting every successful entrapment defense into a section 1983 claim for damages." *Id.* at 411.

The Eighth Circuit in this case correctly concluded that petitioner "propose[d] an[] even greater conversion" than was urged by the plaintiff in *Gunderson*, because

petitioner, unlike the plaintiff in *Gunderson*, did not even raise, much less prove, defenses of entrapment or outrageous government conduct in the criminal proceeding against him. See Pet. App. 8. The court of appeals observed that allowing plaintiffs to maintain *Bivens* actions based on conduct that could have been, but was not, raised in prior criminal proceedings would "flood the federal courts with constitutional damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly." *Ibid.*

Petitioner offers no convincing reason why he should be allowed to maintain a *Bivens* claim despite his failure at his trial to raise the alleged government misconduct underlying the *Bivens* claim. Although petitioner asserts that "[h]e was the victim of an incompetent defense [counsel]," Pet. 6, that assertion was resolved against him in his first collateral challenge to his conviction, when both courts below rejected his claim of ineffective assistance of counsel at trial. See p. 3, *supra*.

Petitioner also suggests that the Eighth Circuit erroneously applied the doctrine of collateral estoppel against him in relying on his failure to raise a claim of outrageous government conduct in the criminal proceeding. See Pet. 10. The court of appeals, however, expressly recognized that the doctrine of collateral estoppel was inapplicable here. See Pet. App. 8-9, citing *Haring* v. *Prosise*, 462 U.S. 306, 322 n.11 (1983) (guilty plea in state criminal proceeding does not have collateral estoppel effect in later action under 42 U.S.C. 1983). Instead, the court of appeals merely held that a criminal trial is the proper forum in which to raise a claim of governmental misconduct of the sort alleged here in the first instance. See Pet. App. 9. That holding was consistent with *Gunderson*. See *Gunderson*, 904 F.2d at

411; cf. *Heck* v. *Humphrey*, 114 S. Ct. 2364, 2372 (1994) ("when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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